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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

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November, 1979

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In its Motion to Dismiss Appeal or Affirm Judgment Below ("Motion"), the Public Service Commission of the State of New York ("Commission") has made two factual assertions which are erroneous and require correction.

1. On page 3 of its Motion, the Commission states that in the proceeding before it "[n]o party advocated permitting general promotion of electricity." This statement is incorrect; the Commission appears to be confused between what appellant should be free to do and what it proposes to do if the ban on promotional advertising is lifted.

Several parties, including Central Hudson Gas & Electric Corporation ("Central Hudson"), (R.* 604-606), the New York Broadcasters Association (R. 481-489), Rochester Gas

* References to "R. " are to pages in the record before the New York State Court of Appeals.

& Electric Corporation (R. 524-537), Niagara Mohawk Power Corporation (R. 539-547), Long Island Lighting Company (R. 548-597), New York State Electric & Gas Corporation (R. 607-608) and the American Association of Advertising Agencies, Inc. (R. 627-639), challenged the ban on promotional advertising and requested that it be lifted in its entirety. These parties asserted that, in the absence of evidence of deception, illegality or inability to furnish service, the Commission was constitutionally foreclosed from prohibiting promotional advertising.

Assuming the Commission's ban is lifted, Central Hudson will be entitled to engage in truthful advertising, unfettered by Commission interference. However, as was made plain to the Commission below (e.g. R. 84-87), Central Hudson does not intend to promote consumption of electric energy merely for consumption's own sake. Were the Commission's ban to be invalidated, Central Hudson would intend to exercise its right to advertise by providing the public with information on specific, new or innovative uses of electric energy or methods of replacing other forms of energy with efficient applications of electric energy. Electric utilities in New York State have demonstrated responsibility and due regard for the public interest when engaging in promotional advertising. A fact acknowledged by the Commission when, a year prior to the initial imposition of the promotional advertising ban, it cited the "appropriate self-restraint in relation to promotional advertising" of electric utilities (*Statement of Policy on Advertising and Promotional Practices by Public Utilities,* 12 NY PSC 108R, 110R (1972)) in finding no need for a ban.

2. On page 19 of its Motion, the Commission contends that Central Hudson's arguments concerning the invalidity of the Public Service Law and the Commission's order for lack of adequate statutory standards, overbreadth and vagueness are not properly before this Court because they were not raised below. There is absolutely no basis for this contention.

As the Commission well knows, Central Hudson raised these arguments below. The question of the overbreadth of the Commission's order was specifically raised in Central Hudson's Brief (pp. 36-37) to the Court of Appeals. Prior to the decision of the Court of Appeals, Central Hudson argued that the Public Service Law could not be construed to grant the Commission the authority to regulate advertising and pointed out (Brief p. 17, Reply Brief pp. 2-3) that if the court construed the Public Service Law to confer such authority on the Commission serious constitutional questions would be raised by such a construction. After the Court of Appeals issued its opinion, which found implied authority for the Commission to regulate advertising in the Public Service Law, Central Hudson filed a motion for rehearing, drawing that court's attention to the defects inherent in such a construction because of the lack of adequate standards for the regulation of speech contained in the Public Service Law. In its response (pp. 4-5) to Central Hudson's motion for rehearing, the Commission specifically addressed this issue.

In any event, the arguments of lack of adequate statutory standards, overbreadth and void for vagueness fall within the rule enunciated by the Court in *Dewey* v. *Des Moines,* 173 US 193, 198: "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." Also see *Raley* v. *Ohio,* 360 US 423,426-427; the New York Court of Appeals also follows this rule. *People* v. *De Bour,* 40 NY 2d 210, 215, 386 NYS 2d 375 (1976).

Central Hudson's petition to the New York courts clearly challenged the validity of the Commission's order under the First and Fourteenth Amendments of the United States Constitution (App. 70a). Each of the opinions of the lower courts explicitly considered the question of the validity of the order under the First Amendment. A challenge to the validity of a state statute under the First Amendment subsumes the subsidiary questions of lack of adequate standards, overbreadth and void for vagueness.

Conclusion

The existance of a substantial Federal question which merits consideration by the Court has been demonstrated; accordingly, the Motion to Dismiss or Affirm should be denied.

Respectfully submitted,

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